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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 184

MAX HALPERIN,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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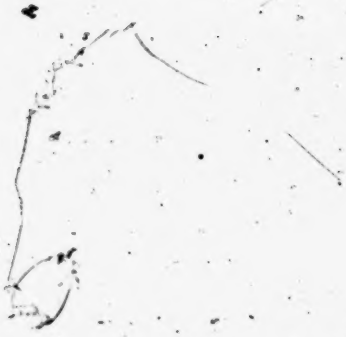

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, Max Halperin, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case.

Opinions Below.

There was no opinion in the District Court. The prevailing and dissenting opinions in the Court of Appeals have not yet been officially reported. The prevailing opinion is printed in Vol. V appendix at pages 288a to 316a. The dissenting opinion of Judge Frank is printed in Vol. V appendix at pages 316a to 357a. Petitioner's application for rehearing was denied without opinion by the majority. Judge Frank dissented in an opinion not yet officially reported. It is printed in Vol. V appendix at pages 380a to 393a.

Statement of Jurisdiction.

The Court of Appeals herein affirmed the conviction of the petitioner by a divided court by judgment dated and entered on April 10, 1956, the majority consisted of Judges Medina and Hincks. Judge Frank voted to reverse petitioner's conviction and to grant him a new trial.

Petitioner duly filed for rehearing, which was denied by order dated and entered on June 1, 1956, Judge Frank dissenting. This petition is filed within thirty days thereafter.

The mandate of the Court of Appeals herein has been stayed by the Court of Appeals pending application for certiorari, pursuant to its Rule 28(c).

The jurisdiction of this Court is invoked under Section 1254 of Title 28, United States Code, and Rule 37(c) of the Rules of Criminal Procedure.

Questions Presented.

1. When a defendant testifies in his own defense at his trial, and his answers to questions show that, although averring his innocence, he was justified in invoking the Fifth Amendment with regard to like questions before a Grand Jury—as in this case all agree—is not that defendant denied due process when the Government on cross-examination brings out before the trial jury, the fact that he refused to answer the questions before the Grand Jury, upon such constitutional grounds?

2. When a defendant has been subpoenaed to testify before a Grand Jury in an investigation, of which he is a primary target, has claimed his Constitutional privilege, advised the Grand Jury that he was doing so as an innocent man ensnared in suspicious circumstances and because he

could not cross-examine or be represented by counsel, may the trial court charge the jury that they may consider his refusal to testify before the Grand Jury on the score of his credibility, although his trial testimony was entirely consistent with his position before the Grand Jury?

3. Under the circumstances surrounding a defendant's appearance before a Grand Jury as set forth in the last preceding paragraph, does not the Court's instruction as aforesaid illegally impeach and impede the defendant's statutory right to be a witness on his own behalf?

4. Does the rationale of *Raffel* v. *United States*, 271 U. S. 244, apply to prior invocation of the Fifth Amendment before a Grand Jury as distinguished from such action at a prior trial?

5. Does not the doctrine and rationale of *Slochower* v. *Board of Higher Education*, decided by this Court April 9, 1956, compel the conclusion that a defendant under the circumstances aforesaid, is denied due process of law when he is examined by the Government and compelled to admit that he refused to answer questions before the Grand Jury, and the Trial Court advises the jury they may consider that refusal on the subject of his credibility?

6. Is not a defendant, particularly one who asserted that he was invoking the Fifth Amendment as an innocent man being plotted against and beset by suspicious circumstances entitled to have the jury charged, "An innocent man may honestly claim his answers may tend to incriminate him"?

7. Does it constitute due process to subpoena a person to testify before a Grand Jury in an investigation of which he is a primary target, and thereby permit an examination before trial of a *de facto* defendant?

8. Does not the opinion of the Court of Appeals that the statute of limitations against conspiracy was not tolled, in that certain overt acts of concealment when committed were chargeable to the original conspiracy disregard and deny effect to this Court's views on proof of subsidiary concealment conspiracies, as set forth in *Krulewitch* v. *United States*, 336 U. S. 440, and *Lutwak* v. *United States*, 344 U. S. 604?

9. Does not the conclusion of the Court of Appeals herein that a single conspiracy rather than a multiplicity of conspiracies are disclosed by the record, run counter to this Court's decision in *Kotteakos* v. *United States*, 328 U. S. 750?

10. Does not the record disclose that the testimony of one characterizable as the chief architect of the alleged conspiracy was improperly bolstered by proof of his hypothetical prior consistent statements at a time when he had the same motives to prevaricate as at the trial, and does not the conclusion of the Court of Appeals that such evidence of prior consistent statement was admissible constitute a potentially harmful precedent in the administration of criminal justice in the federal courts?

11. Does a lawyer who advises a witness to plead the Fifth Amendment where the witness is justified in doing so become guilty of corruptly endeavoring to influence the witness merely because the interposition of the Constitutional privilege might also serve to protect the person giving the advice?

Constitutional Provision and Statutes Involved.

The constitutional and statutory provisions involved are, Fifth Amendment, 18 U. S. C. 371, 18 U. S. C. 3282, 18 U. S. C. 1503 and 18 U. S. C. 3481. They are printed in appendix A, infra.

Statement of the Case.

The indictment containing seven counts was filed on October 25, 1954, against petitioner Max Halperin, Henry W. Grunewald, Daniel A. Bolich and others:[1] in Count 1 all defendants are charged with conspiracy to defraud the United States in the exercise of its governmental functions of administering the internal revenue laws, and to conceal the acts of the conspirators, in violation of the general conspiracy statute, 18 U. S. C., Section 371; in Counts 5, 6 and 7 petitioner Halperin and others are charged with having corruptly endeavored to influence witnesses before the Grand Jury in the Eastern District of New York in violation of 18 U. S. C., Section 1503. The conspiracy is alleged to have been in operation from January 1, 1946 to the return date of the indictment; and the activities of Halperin, charged in Counts 5, 6 and 7, are alleged to have taken place in March, 1952. Counts 3 and 4 were dismissed and are not involved on this petition.[2]

Although the Court of Appeals unanimously affirmed the convictions of Grunewald and Bolich, Judge Frank filed a dissenting opinion as to the petitioner Halperin, holding that his Constitutional rights were violated, by the government's cross-examination at the trial, disclosing the fact that he had claimed his Constitutional privilege

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[1] Grunewald and Bolich are also proceeding in this Court by separate petitions for certiorari.

[2] Count 2 of the indictment was against Bolich, Sternberg and Scherm as employees of the Bureau of Internal Revenue. Steinberg and Scherm were acquitted, Bolich was convicted. Davis, Schopick and Hoffman were named as defendants, but the case as to them was severed. Petitioner Halperin was sentenced to five years imprisonment and $5,000 fine on count 1, and two years imprisonment and $1,000 fine on each of counts 5, 6 and 7, prison sentences to run concurrently.

Grunewald was convicted of conspiracy under Count 1, but the Court acquitted him under Counts 5, 6 and 7 (583).

before the Grand Jury. Judge Frank again dissented from the majority ruling denying a re-hearing to the aforesaid defendants, this time extending his dissent to the Statute of Limitations' point, and holding that the conviction of all of the defendants was barred by the Statute of Limitations.

The charges in the indictment arose out of the administrative disposition of two alleged tax evasion cases which were being investigated by the Internal Revenue Bureau. One was known as the Pattullo Modes case and the other as the Gotham Beef case. Both concerns were represented by the New York law firm of Schopick & Davis (303, 317-318).[3] Petitioner Halperin, a practicing attorney for forty-five years (616), now in his 72nd year (615), had shared office space with the firm at the time in question (617-619).

According to the testimony of Davis, who was the government's chief witness, he had suggested to Halperin that Halperin contact Grunewald in Washington to get help in the Pattullo Modes case, and that Halperin, after some negotiation, told him that Grunewald had agreed to accept $100,000 (328-330). Thereafter, on January 5, 1949, Bolich, then Assistant Commissioner of Internal Revenue, told the Agent in charge of the Pattullo Modes case to close out the Pattullo Modes case on a non-prosecution basis (475-476). This decision was announced to the taxpayers on January 10, 1949 (445, 477-478).

The object of the Pattullo Modes transaction was expressed by its principal Marks, named as co-conspirator, but not indicted, as follows:

> "He [Davis] says all he could promise was that there would be a memorandum put into our file that the case was to be settled on a civil basis" (36).

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[3] References are to pages in Grunewald-Halperin appendices in

In the Gotham Beef case, according to the government's proof, $60,000 was put in escrow by the principals therein (168, 326) and on October 28, 1948, they were told that the case was closed without criminal prosecution (284).

The object of this transaction was expressed by the Gotham Beef principal Tobias, also named as a co-conspirator, but not indicted, as follows:

> "Now, the exact terms of the escrow • • • was • • • that until I were to have heard with my own ears from the Special Agent's office from a responsible official that there was to be no criminal prosecution in the Gotham matter • • • the money was not to be released" (167).

Petitioner, Halperin, a lawyer, now over 71 years of age, was the only one of the three convicted defendants who testified in his own behalf. His testimony on direct showed his professional association with several alleged co-conspirators, and his acquaintanceship with others, and professional employment in connection with the tax matters (620-686). Halperin strongly protested his innocence. His narration of the extent of his participation in the tax matters being entirely exoneratory in tenor (Pattullo Modes, 621-623, 629, 630, 635, 636, 641-646; Gotham Beef, 667-670-675).[4]

Thereupon, the Government was permitted to elicit from Halperin, and bring to the conspicuous notice of the jury upon cross-examination, over objection and exception (695, 705), that Halperin had invoked the Fifth Amendment before a Grand Jury in response to questions relating to the aforesaid associations and dealings (694-708) despite the fact that both the majority opinion and the dissenting

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[4] Judge Frank, commenting upon the evidence, wrote (Vol. V appendix page 329a):

> "The evidence against Halperin is not overwhelming. The jury could have reasonably acquitted him."

opinion in the Court of Appeals acknowledge that Halperin was justified in claiming his Constitutional privilege upon the record (Vol. V—Appendix pages 311a, 317a).[5]

On re-direct, it was shown by reference to the Grand Jury minutes, that Halperin informed the Grand Jury that he was an innocent man and that he was invoking the Fifth Amendment (719, 720), because he had no right to cross-examine witnesses against him in Grand Jury proceedings (722). Halperin also advised the Grand Jury that he was acting on advice of counsel (719, 721). Halperin, it must be noted further, was a target of the Grand Jury investigation (709, 710).

Thus, it was affirmatively, and indeed, conclusively shown that no inconsistency existed between Halperin's course of conduct before the Grand Jury and at the trial. Nevertheless, in this case, in which all that could stand between Halperin and conviction was his credibility, the Trial Court authorized the jury to reject his testimony on the ground that he had asserted his Constitutional privilege before the Grand Jury (768; Exception 777).

Moreover, the Trial Court denied the request to charge "An innocent man may honestly claim that his answers may tend to incriminate him" (798, 728, 729).

The only overt acts shown to have been committed within three years of the filing of the indictment, related only to acts of concealment. Hence, prosecution was barred under 18 U. S. C., Section 328—all agree—Prevailing Opinion (Vol. V—Appendix p. 310a), Dissenting Opinion, (Vol. V—Appendix pp. 385a, 386a), unless there existed an endlessly surviving conspiracy to conceal as part of the original conspiracy.

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[5] Judge Frank wrote "No one doubts he then properly asserted the privilege" (Vol. V appendix, 317a).

After the credibility of the co-conspirator Davis (as to whom trial had been severed) who was the Government's principal witness, had been subjected to devastating attack, the Government on re-direct attempted to rehabilitate him by eliciting from him over objection and exception (395-407) that on or about the time of a Grand Jury investigation into the subject matter of this prosecution, and pursuant to a proposal by the witness that he would cooperate with the Government in its case against the appellants herein (395, 398, 399), Davis had made, through an attorney, a hypothetical statement consistent with his trial testimony. This testimony was admitted despite the fact that Davis' motive to fabricate at that time coincided with his motive to fabricate at the trial.

In February 1952 a grand jury was empaneled to investigate administration of the Internal Revenue Laws and their enforcement. The evidence in support of the charge in Counts 6 and 7 that Halperin attempted to corruptly influence Berman and Tobias, Gotham Beef principals, as prospective witnesses, shows however that Halperin merely advised them to plead the Fifth Amendment after learning from Berman for the first time that $60,000 had been put up by them in escrow in connection with their tax case (682).

Under Count 5, there was no evidence that Halperin himself had spoken to the Pattullo Modes principals concerning his role as a grand jury witness. The evidence did not support conviction in consequence of Davis' conversation with Marks since all that had been discussed by Halperin with Davis was speculation as to whether his clients would claim their Constitutional privilege before the grand jury (367, 368).

ARGUMENT.

I.

(Questions Presented 1-7.)

(A) Elicitation from appellant Halperin that he had invoked the Fifth Amendment before the Grand Jury, as a calculated feature of cross-examination by the Government at his trial; (B) the Court's charge that his claim of Constitutional privilege might discredit his trial testimony; and (C) the Court's refusal to charge that "an innocent man may honestly claim that his answers may tend to incriminate him.", derogated the Fifth Amendment and constituted a denial of due process at the trial, invalidating his conviction.[6]

In view of the fact that petitioner was justified upon the record in refusing to answer questions before the Grand Jury under the Fifth Amendment, as indeed the prevailing and the minority opinions in the Court of Appeals (Vol. V—Appendix pp. 311a, 317a), and the Trial Court (768) agree, it follows that the moment the Government launched upon the project of exposing Halperin's claim of Constitutional privilege on his cross-examination before the trial jury, he was denied due process by being arbitrarily penalized for having taken advantage of his Constitutional right.

The penalty resulting from the jury's inevitable prejudice against a person refusing to incriminate himself, follows from the popular conception that the Constitutional amendment was intended only for the protection of the

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[6] Phases of this point were the subject of Judge Frank's dissent from the prevailing opinion affirming Halperin's conviction.

guilty,[7] was intensified and given judicial direction when the Trial Court charged the jury in effect that they might disbelieve Halperin's testimony and convict him in consequence of his having invoked the Fifth Amendment before the Grand Jury (768).[8]

There can be no doubt that given the acknowledged circumstance that Halperin was justified in claiming his Constitutional privilege, that under the doctrine of *Slochower* v. *Board of Higher Education* (100 L. Ed. Adv. Rep. No. 11, p. 449), decided by this Court on April 9, 1956, Halperin was being denied due process, by being arbitrarily penalized for having invoked the Fifth Amendment.

In the *Slochower* case, this Court wrote (at p. 454, *supra*):

> "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen'. *Brown* v. *Walker*, 161 U. S. 591, 610, 40 L. ed. 819, 825, 16 S. Ct. 644. We have reaffirmed our faith in this principle recently in *Quinn* v. *United States*, 349 U. S. 155, 99

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[7] As stated by Professor Ralph S. Brown, Jr., a Professor of Law at Yale Law School, in 40 American Bar Association Journal, 404, 406, May, 1954:

> "What does the public know about the Fifth Amendment anyway? It is told in every headline on the authority of prominent legislators, that silence means guilt."

[8] The Trial Court instructed the jury: "However it was proper for the Government to question the defendant with respect to his previous invocation of the Fifth Amendment, but you may consider this evidence of his prior assertions of the Fifth Amendment only for the purpose of ascertaining the weight you choose to give to his present testimony with respect to the same matters upon which he previously asserted his Constitutional privilege" (768).

L. ed. 964; 75 S. Ct. 668. In *Ullmann* v. *United States*, —U. S.— (100 L. ed. Advance p. 361, 76 S. Ct.—), decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury.

As we pointed out in Ullmann, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstance. See Griswold, the Fifth Amendment Today (1955)."

* * * * * * *

(p. 455) "In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice, conscientiously given, whether wisely or unwisely.

* * * * * * *

Since no inference of guilt was possible from the claim before the Federal committee, the discharge falls of its own weight as wholly without support. There has not been the 'protection of the individual Mr. Justice Cardozo characterized as the very essence of due process.' *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292, 302, 81 L. ed. 1093, 57 S. Ct. 724."

If the record disclosed that Halperin's testimony at his trial indicated that Halperin was perjuring himself when he had claimed his testimony would tend to incriminate and that in fact he was not ensnared in suspicion raising circum-

stances, it might be that the discrepancy might have been the subject of cross examination without denial of due process. This, however, was conspicuously not the case. His justification to refuse to answer before the Grand Jury is conceded.. He was entitled to invoke the Fifth Amendment.

This result was appreciated by the Court in *Masterson* v. *Transit Co.*, 204 Mo. 507, 524, 525, which wrote:

> "The right of the motorman to refuse to testify under the circumstances stated was a personal right of such high importance that it is expressly guarded in the Constitution itself. It is there given absolutely and unequivocally, yet we are now asked to declare that it is a right which the citizen will exercise at his peril, the peril of being branded with suspicion, the peril of having it brought up against him to impeach himself if he should ever assert his innocence. Such a ruling would be a gross impairment of the constitutional right;"

It is respectfully submitted that the *Masterson* case view coincides with the recent decisions of this Court culminating in the *Slochower* decision.

There is no more firmly established rule in the field of evidence than that which requires that only when inconsistency has been shown may former conduct be weighed against the witness' credibility (3 Wigmore on Evidence, Page 725, Section 1040).

It is interesting to note that in *Commonwealth* v. *Smith*, 163 Mass. 411, 432, the Court in approving the right to cross examine a witness regarding a prior claim of refusal to answer on the ground of self-incrimination, found it necessary first to search for and purport to find the element of inconsistency. Thus concerning the nature of the Constitutional privilege, as intended only for the guilty, the Court noted:

> "The defendant in such case now says he is innocent. He formerly did not say he was innocent, but that he would not answer lest he might incriminate himself."

In our case, even this misconceived inconsistency did not exist. Halperin did formerly say he was innocent and his testimony shows moreover that his innocence, as noted in the *Slochower* case, was of a nature beset by circumstances of guilt which justified this action.

The Massachusetts Court erred in failing to recognize that innocence and self-incrimination are not mutually exclusive but may readily co-exist, but within the framework of the Court's mistaken view, the fact remains the Court appreciated it must be able to pinpoint an inconsistency before it could hold the witness' credibility may be deemed impoached by the jury.

The case of *Raffel* v. *United States*, 271 U. S. 494 is not to the contrary, and in any event, it has been reversed in principle by the recent trend of this Court's decisions culminating in the *Slochower* case. On these phases, the Court is urgently, respectfully referred to the dissenting opinion of Judge Frank (Vol. V—Appendix pp. 317a-330a) manifestly written before this Court's decision.[9]

The Trial Court compounded the prejudicial effect of this instruction authorizing petitioner's conviction via the destruction of his credibility because of his invocation of of the Fifth Amendment by refusing to charge as requested that "An innocent man may honestly claim that his answers may tend to incriminate him" (798, 728, 729), especially in view of the Court's attitude toward Halperin's claim

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[9] The appeal herein was argued in the Court of Appeals on November 15, 16, 1955. Its decision was announced April 10, 1956. The *Slochower* case decision became public on April 9, 1956.

of constitutional privilege, as exemplified by his remarks in the course of trial.[10]

The prevailing opinion overlooked the vital difference between the requested charge and that given (768): the requested charge would have served to correct the jury's misconceptions that an innocent man can not claim to be incriminated by his answers, and thus have explained to the jury why Halperin's action before the Grand Jury was irrelevant to the issues. The charge as given merely arbitrarily directed the jury to disregard what they undoubtedly deemed an important relevant fact.

For discussion in another context of the futility of admonishing a jury to disregard what it may deem impor-

[10] While Halperin was being cross examined, the Court interpreted the Constitutional privilege in such fashion as to literally destroy the defendant Halperin's credibility. The Court said (697) "I know the Government's position. As I see it, Mr. Corbin, no witness can be compelled to testify against himself. The witness is called before the grand jury and the answer was, I refuse to answer something on the ground that if I answer that question *it will incriminate me*. Mr. Corbin: Tend to incriminate. The Court: Or tend to incriminate. * * *."

The Court went further and said (703). "The Court: Would an answer to that question have incriminated you or tend to incriminate you?" Upon objection, it was withdrawn. Again, at page 705, Mr. Halperin was still being examined with respect to his claim of privilege before the Grand Jury. The Court asked (705) "And you say the answers given were true?", to which again objection was taken, and the Court went on to say "The witness says he testified before the Grand Jury. I want to find out, when he says the question is there and the answer is there, whether he is also conceding that he was sworn to tell the truth and it was a truthful answer; not that it is merely in the minutes, but that that is the sworn testimony."

Counsel objected that it was an implication by the Court that the witness was lying. The Court again replied that he was not implying "that it was untrue."; that all he wanted to find out was that the defendant was not merely admitting that it was in the minutes, but that it was sworn testimony.

During the exchange motion for a mistrial and the withdrawal of a juror was made, it was denied and an exception taken (704).

It is, thus, obvious that with the leverage of Halperin's claim of privilege, the Court destroyed his credibility before the jury and the charge was even less than lip service to the rule.

tant, relevant facts, mistakenly or otherwise, see Dissenting Opinion below and Appendix thereto (Vol. V—appendix pp. 320a, 331a, 340a). Of course, an expository instruction showing the facts to be *irrelevant* is an entirely different matter and not subject to the charge of psychological futility.

Militating further to remove the Trial Court's rulings on the subject of the Fifth Amendment from conformity to the essential dictates of "appropriate judicial guidance" (*Bollenbach* v. *United States*, 326 U. S. 607, 6[illegible]), is the fact that petitioner Halperin was the target of the Grand Jury investigation (709, 710, not contested by Government). He was a "*de facto* accused" in the language of *United States* v. *Scully*, 2 Cir., 225 F. 2d 113. He should not have been called before the Grand Jury at all, since by doing so, the Government was seeking an unsanctioned examination before trial. In the *Scully* case, the Court wrote at page 116 of 225 F. 2d:

> "Indeed, one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a Grand Jury any person who is *de jure* or *de facto* an accused. The absence of appeals to this court involving the problem under discussion would seem to indicate that some such rule or practice is observed in the prosecutors' offices in this circuit."

Compare *United States* v. *Minker*, 100 L. Ed. Adv. Rep. No. 6, pages 192, 203, decided by this Court on January 16, 1956.

This Court once granted certiorari apparently upon this point, but the appeal was not prosecuted (*O'Connell* v. *United States*, 2 Cir., 40 F. 2d 201, decided by a divided court, certiorari granted 281 U. S. 716, dismissed years later under Rule 35, 296 U. S. 667.

Still another aspect of the multiple error implicit in the Court's rulings arises from the fact that a defendant has a statutory right to testify, no less than a right not to testify.

In *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656, 658, the Court noted, that the Government in a criminal case had no right to prejudice the defendant's election of whether or not he should take the stand in his own behalf. In the interest of the full development of the facts at a criminal trial, it would appear that a defendant's right to testify (18 U. S. C. 3481) should be safeguarded, no less than his right not to testify, and should not be prejudiced in advance.

In conclusion, it need only be noted that the error herein involving as it does, constitutional and statutory considerations, as well as appropriate judicial guidance to juries cannot be deemed merely technical.

Bruno v. *United States*, 308 U. S. 287, *supra*;
Bollenbach v. *United States*, 326 U. S. 607, *supra*;
DISSENTING OPINION, Vol. V, appendix p. 329a.

II.

(Questions Presented 8, 9.)

The Court of Appeals erred in holding that the Statute of Limitations did not bar prosecution of Halperin on the conspiracy charge (Count One).

On this aspect of the case, not only did Judge Frank dissent on the application for rehearing and vote to grant all of the convicted defendants a new trial, but the prevailing opinion commented: "This is an interesting and important question, seemingly one of first impression" (Vol. V, appendix p. 299a).

Consideration of this contention is facilitated and focalized by a passage in the Trial Court's instructions to the jury supplemented by a concession made by the Government.

The Trial Court charged that the Statute of Limitations barred conviction of the defendants upon the First Count unless an overt act was committed within three years prior to the date of the indictment, that the indictment alleged that the conspiracy comprehended within it, a conspiracy to conceal the true facts from investigation should investigation thereafter eventuate, and that to convict the jury must determine that the conspiracy did indeed comprehend a conspiracy to conceal and that an overt act to carry out such purpose occurred within the three year period (750).

This aspect of the Court's charge dovetailed with the Government's concession, made in the course of argument upon defendants' motions to dismiss at the end of the Government's case, that no overt acts other than concealment had occurred within the three year period prior to the date of the indictment (578).

The separate conspiracies in our case, having specific objectives, terminated when the objectives were accomplished. Thus, the Pattullo Modes criminal prosecution conspiracy allegedly involving Halperin, Grunewald and Bolich, terminated when word of no-prosecution was communicated to the Pattullo principals in January, 1949 (36, 41, 76, 228-232, 335). The Gotham Beef conspiracy likewise terminated when the decision of no-prosecution was received by the Gotham principals in October, 1948 (149, 150, 155, 167, 187, 328). These two account for the mainstream of the Government's proof, and in view of the direct evidence in the case, the date of termination of the conspiracy can be set with chronological accuracy.

The direct evidence in our case with its verbatim context of separate conspiracies precludes resort to inferences[11] to spell out a single conspiracy.

Conspiracies are deemed terminated when their objective is accomplished and this accomplishment of objective and end of conspiracy can be pinpointed, in our case, as to time and place. (*Krulewitch* v. *United States*, 336 U. S. 440, 442, 443; *Lutwak* v. *United States*, 344 U. S. 604, 616, 617; *People* v. *McQuade*, 110 N. Y. 284, 308 (bribery conspiracy accomplished—not continued by co-defendant's alleged subordination of perjury at senate committee hearing); *United States* v. *Irvine*, 98 U. S. 450, cited in *Fiswick* v. *United States*, 329 U. S. 211, 216.)

In our case, it is clear, that the various conspiracies, or any conspiracy cognizable under the First Count of the indictment had terminated more than three years prior to the date of the indictment herein.

Any conspiracy with regard to dissuading the Pattullo Modes or Gotham Beef taxpayers from giving testimony before the Grand Jury or to dissuade them from speaking to Congressional Committee investigators, upon the record, had its genesis after the conclusion of the Pattullo Modes and the Gotham Beef conspiracies. (See Dissenting Opinion, on Petition for Rehearing, Vol. V, appendix p. 389a). There is no evidence that before the termination date of either of these conspiracies, it was ever an object of the conspirators to dissuade the Pattullo Modes or Gotham Beef taxpayers from answering questions of the Congressional Committee investigators or from testifying before the Grand Jury. Indeed, there could not have been, for neither the Congressional Committee nor the Grand Jury were then in existence or even projected.

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[11] *Guaranty Trust Co.* v. *Minneapolis & St. Louis R. R. Co.*, 8 Cir., 36 F. 2d 747, 757; *Consumers Power Co.* v. *Nash*, 6 Cir., 747, 757; 20 *Amer. Jur.* 163.

The Government's contention, that a subsidiary conspiracy to conceal survived the central criminal tax fraud objectives, is simply a re-statement of the Government's contentions, made and rejected in *Krulewitch* v. *United States*, 326 U. S. 440, 443, and *Lutwak* v. *United States*, 344 U. S. 604, 616.

The position of petitioner Halperin, and indeed that of the other convicted defendants, Grunewald and Bolich, has been that the alleged conspiracy herein terminated in 1949 when the taxpayers received administrative assurance of no criminal prosecution. In support of this position we have quoted the very words of the respective taxpayers concerning the tenor of their understanding of the alleged conspiracy (see, *supra*, pp. 6, 7).

Although Judge Frank, in his dissenting opinion upon the petition for rehearing does not entirely accept this contention and perceives in the evidence the possibility that the conspiracy herein encompassed the purpose of preventing prosecution of the taxpayers for tax evasion, subsequent to the no criminal prosecution administrative accomplishment, in 1949, Judge Frank nevertheless acknowledges that the jury "may well have found—and, for all we know did find—that the conspiracy ended in 1949, since the jury may have found that it was not a purpose of the conspiracy to prevent prosecution of the taxpayers for tax evasion after that date" (Vol. V, Appendix p. 388a).

Assuming that the jury did so find, Judge Frank proceeds to accept petitioner Halperin's contentions, in the following language (Vol. V, Appendix p. 389a):

> "Even so, such an overt agreement to conceal, made after 1949, could not reasonably serve to prove that the conspiracy, if it otherwise ended in 1949, had, before 1949, included an agreement—other than by implication from the mere existence of the con-

spiracy—to conceal the conspiracy after 1949. It could serve, at most, to prove a new conspiracy to conceal an older conspiracy. In that event (although such a new conspiracy would be evidence of the older conspiracy) the defendants could not, on such evidence, be convicted of the older conspiracy which ended in 1949, since the statute of limitations would have run against the older three years after 1949. See *U. S.* v. *Siebricht,* 59 F. 2d 976, 978 (C. A. 2) to the effect that an old conspiracy "could not be revived by the breath of a new and different conspiracy * * *" The defendants were not indicted for such a new conspiracy, and the judge's charge precluded a conviction based thereon.[7] See, e. g., *U. S.* v. *Siebricht, supra.*

It follows that, if (1) the jury found—as it may have—that the conspiracy ended in 1949, it could not also reasonably have found (2) that the conspiracy included any understanding to conceal the conspiracy (in order to avoid detection and punishment for conspiracy) other than such an understanding implied in the mere fact of the conspiracy. The second of those findings would be bad, under *Krulewitch.* But the charge permitted the jury to render a verdict of guilty based on both such findings. I think the language in *Lutwak* cannot be stretched to sanction such a charge, and that therefore the charge was erroneous."

Judge Frank concludes that the Court erred in failing to instruct the jury that if it found that the conspiracy ended in 1949, they could not convict the defendants (Vol. V, Appendix pp. 383a, 384a).

Such charge was requested (Grunewald's Request No. 23, (793), Exception (728); adoption by Halperin of Grunewald's Requests and Exceptions (Transcript 4080; Appendix 729)).

III.

(Question Presented 10.)

The Court of Appeals' decision approving of the Trial Court's permitting the government on re-direct examination of Davis, to elicit from him the fact that he had made a prior consistent hypothetical statement respecting the Pattullo modes and Gotham payments, at a time when he had the same motive to make the statement as he did at the trial, introduces confusion into a hitherto well-settled rule of the law of evidence prohibiting proof of prior consistent statements under such circumstances.

On re-direct of Davis, the Government elicited from him over repeated objections (395-407), that at or about the time of the Brooklyn Grand Jury investigation in 1952, there were negotiations with a view to cooperation by Davis with the Government, at which Davis, himself, was not present, but which negotiations were held at conferences between Davis' attorney and the representatives of the Government (395, 398, 399).

Over continuing objection and exception (399-407), the Government elicited from Davis that at such conference, he authorized his "attorney to make certain disclosures there on a hypothetical basis" (399). The hypothetical situation, which he authorized his attorney to discuss, were the facts involved in a conspiracy to defraud the United States in connection with the *Gotham Beef* and *Pattullo Modes* cases (400). Davis said that he authorized his attorney to reveal the fact with respect to the $100,000 and $60,000 (401).

Thus, Davis had the same motives to fabricate as at the trial. In any event, the circumstances under which the

introduction of prior consistent statements are permissible, did not exist in this case.

Dowdy v. *United States,* 4 Cir., 46 F. 2d 417, 424;
58 Amer. Jur. 465 "Witnesses" Sec. 829;
United States v. *Potash,* 2 Cir. 118 F. 2d 54, 57.

The purported prior consistent statements of Davis, the record affirmatively shows, are barred under the limitations upon the rule set forth, *supra,* in the *Dowdy* case, and in the quotation from American Jurisprudence. The alleged consistent statements (1) were not made soon after the transaction to which they relate; (2) were not made at a time when such fact or facts pertinent to the issues involved as reasonably furnish some test of the witness' integrity and accuracy of recollection, and (4) the alleged consistent statements, it plainly appears, were made at a time when the witness had the same motive in speaking that governed him when testifying.

Moreover, the Trial Court, itself, invested this erroneously admitted testimony by Davis with the greatest force and effect, stating that it tended to refute the charge, that the testimony given by Davis at the trial was a fabrication (398, 404), when actually it had no such potentiality. It follows that the Court of Appeals' opinion appears to disturb an important principle of law.

IV.

(Question Presented 11.)

The Court of Appeals' opinion appears to hold that a person may be guilty of corruptly attempting to influence a witness by advising him to plead the Fifth Amendment even though the plea is justified. This is contrary to federal law on the subject.

The question of whether a person may be convicted of corruptly influencing witnesses solely on proof that he advised a witness to plead the Fifth Amendment where the witness was justified in doing so, even though the plea would also serve the interests of the person giving the advice, is an important question of Constitutional law not directly decided by this Court.

The reasoning of the Court in *United States* v. *Herron*, 28 F. 2d 122, 123, D. C. Calif., in holding that it is not the law to make criminal the act of advising a witness to plead the Fifth Amendment where he is justified in doing so irrespective of the motive of the person so advising, is sound, we respectfully submit. The Court wrote:

> "In the case of Ex parte Irvine (C. C. 1896) 74 F. 954, Circuit Judge Taft, now Chief Justice of the United States Supreme Court, in his decision said as follows: 'It is argued by counsel for the respondent that there was evidence before the trial court to show that the privilege was pleaded in bad faith, merely to save the defendants, and not to protect the witnesses from a prosecution of themselves. * * * We do not understand any of the American authorities to go so far as to hold that where from the evidence and the nature of the question, the court can definitely determine that the question, if answered in a particular way, will form a link in the chain of events to establish the commission of a crime by the witness,

the court should inquire into the motive of the witness in pleading his privilege.'

The witness himself, therefore, is protected in his claim of privilege by being allowed the privilege, irrespective of his motive for claiming the same.

In this case the defendant Herron is charged with influencing, by advising, the witness Rasmussen to claim a lawful privilege, and I do not believe it is the law or the policy of the law to make criminal, no matter what the motive might have been, the advising a witness to do that which was lawful and *would in fact* have protected the witness from disclosing self-incriminating matter." (Emphasis in original.)

The Court of Appeals' opinion, on the other hand, appears to affirm the conviction of Halperin on the corrupt influencing of witnesses counts upon evidence of advice to prospective witnesses to plead the fifth amendment when the witnesses could do so with ample justification. The Court wrote (Vol. V, Appendix p. 315a):

"The evidence adduced in support of Counts 6 and 7 describes attempts by Halperin himself to influence both Berman and Tobias. The substance of what Halperin said to both is reflected in the testimony of Berman that Halperin told him 'he felt he was going to stand on his constitutional rights and not do any talking. He wanted me to take the same stand, that I should not talk and stand on my constitutional rights. He mentioned the fact that he had done me a good turn and that was the least I could do for him.' "[12]

[12] Halperin's testimony was, that in March, 1952, he did not call Berman, but Berman called him (681), and Berman said that Davis was down to see him the day before (682). Berman told Halperin that Davis had told him he was trying to make a deal with the United States Attorney in the Eastern District for immunity for himself and his partner, and that he wanted Berman to back him up by stating that the $60,000 had been paid as a fee (682). This was the first that Halperin knew that $60,000 had been involved in the package (682). Berman asked Halperin what he thought he

The Court of Appeals' opinion appears contrary to the *Herron* case. It is manifest that not only the disposition of Counts 6 and 7, but also of Count 5 is affected by the Court's views contrary to those expressed in the *Herron* case.

Conclusion.

The writ of certiorari should be granted.

Respectfully submitted,

HENRY G. SINGER,
Attorney for Petitioner Halperin.

HARRY SILVER,
With him on the petition.

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should do and Halperin said that Berman should consult a lawyer and that "If you ask me as a lawyer, I would tell you to avail yourself of your constitutional privilege" (683). Halperin did not say that Berman had anything to fear by not talking (683), or that he, Halperin, had done Berman a good turn (683). Halperin never aided and abetted anyone to get Berman to lie or impede justice (684). He had no dealings directly or indirectly with Tobias on March 15, 1952 (684). Halperin denied any conversation prior to Davis speaking to Marks. Under Count Five, dealing with the influencing of Marks, there is no evidence that Halperin, himself, had any conversation with Marks with regard to his appearance before the Grand Jury, and no contention by the Government to the contrary. It is sought to hold Halperin in consequence of a discussion had by Halperin with Davis, Schopick and Hoffman, but all that was discussed there was a canvass of the sentiment of these defendants with regard to whether Davis' clients would plead their Constitutional privilege.

At first they felt that the clients would not talk and would plead their Constitutional privilege (367). Later, they became doubtful about this (368), and it was decided that Davis should communicate with Marks.

Fairly read, there is nothing in Davis' testimony with regard to these conversations which would warrant imputing to Halperin any intent that Davis should do more than merely ascertain his clients' intentions and perhaps to urge them to give further consideration to the advisability of their pleading their Constitutional privilege. Indeed, Davis' testimony shows clearly that his mission was merely one of inquiry and that he realized that there must be nothing said by him which could be used against him if Marks, as he expected, would report his conversation to the Grand Jury (369).

Appendix A.

Fifth Amendment.

"* * * nor shall be compelled in any criminal case to be a witness against himself * * *."

Section 371, Title 18 U. S. C.

"371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Section 3282, Title 18 U. S. C.

(As applicable to offenses prior to 1954 amendment.)

"3282. *Offenses not capital.*

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. June 25, 1948, c. 645, 62 Stat. 828."

Section 1503, Title 18 U. S. C.

"1503. *Influencing or injuring officer*, juror or witness generally.—Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or

officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corrup or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. (June 25, 1948, c. 645, Sec. 1, 62 Stat. 769.)"

Section 3481, Title 18 U. S. C.

"*Competency of accused.*—In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him. (June 25, 1948, c. 645, Sec. 1, 62 Stat. 833.)"